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In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF NEW MEXICO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. In seeking affirmance of the decision below, New Mexico takes issue with our submission that Sandia, Zia, and LACI were procurement agents of the United States. It urges (Br. 5-7) that these contractors were not agents under the standard Department of Energy contract for the management of a government-owned atomic facility because the purchases were made in the name of the contractors, rather than in the name of the United States. Moreover, New Mexico asserts (Br. 26-27) that the advanced funding procedure has no relevance because it does not accord a supplier a claim against the United States, but simply provides a mechanism to insure prompt payment of obligations incurred by the private contractors under the contract and to guarantee that the government will be able to retrieve any undisbursed funds.

But it can scarcely be doubted that the United States can purchase supplies or services through private persons without relinquishing its constitutional immunity from state

taxation. The Court's decision in *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110 (1954), upon which we rely, firmly establishes that proposition. There, as here, a consortium of private companies purchased equipment on behalf of the government for use in performing a government contract. In holding the transactions immune from the Arkansas sales tax, the Court "[found] nothing in the Procurement Act that bars a contract for purchase for the United States of supplies or services by private persons" and "that the Navy Department has power to negotiate contracts which provide for private purchasing agents for supplies and materials" (*id.* at 116).

To be sure, in *Kern-Limerick* the contract provided that "[t]he Contractor shall act as the purchasing agent of the Government in effecting such procurement and the Government shall be directly liable to the vendors for the purchase price" (347 U.S. at 112 n.2). But the fact that the private contractors were the nominal "Buyers" under the standard DOE contract at issue here does not distinguish this case from *Kern-Limerick*. In conformity with the arrangement spelled out in the bid and purchase orders in *Kern-Limerick*, here, as well, "[t]he Government [was] obligated to the Vendor for the purchase price, but the Contractor shall handle all payments * * * on behalf of the Government" (*id.* at 119).

As we have discussed in greater detail in our opening brief (at 32-35), the government's obligation to the vendors to pay the purchase price is a direct consequence of the advance funding procedure. That procedure, as New Mexico points out (Br. 7-8, 26), may serve other purposes such as acheiving prompt payment.[1] But its significance for

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[1]New Mexico also points out (Br. 28) that there are more than 10,000 recipients of government funds that are parties to comparable advance funding arrangements but that they are not agents of the government. We agree. Most of these recipients are grantees of government funds

purposes of constitutional tax immunity lies in the fact that every time Sandia, Zia, or LACI issued a check to a third-party supplier or to one of their employees,[2] they were disbursing funds belonging to the United States and thereby automatically obligating the United States at the very outset. Surely the power to spend government money "gave to the contractors the status of agents of the Government to enter into contracts or to pledge its credit." *Alabama* v. *King & Boozer*, 314 U.S. 1, 13 (1941). Indeed, the only credit or cash at risk in the performance of these standard DOE management contracts was the credit and cash of the United States, for the contracts provided that "[n]either Western [Electric] nor Sandia Corporation shall be required to provide funds for operations under this Contract" (J.A. 32). Thus, the practical import of this provision, as implemented by the advance funding procedure, establishes that the obligations under the contracts were those of the government and not of the contractors. If the contractor receiving after-the-fact reimbursement in *Kern-Limerick* was deemed to be an agent of the United States so that sales to it were immune from state taxes, the case for immunity here follows a fortiori because the contractors have the additional authority to disburse government funds in the

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who use them for purposes unrelated to government contracts. Accordingly, this fact does not undermine the significance of advance funding in the instant case, where the contractors are disbursing funds on behalf of the government for goods and services over which the government asserts immediate title and control.

[2]New Mexico (Br. 5-6) emphasizes that 58% of the contractors' disbursements went to meet their own payrolls. But the contractors' employees are on the same footing as the third-party suppliers of goods. The employees simply supply services for a fee. Hence, the contractors' disbursements to suppliers of both goods and services are immune from tax.

first instance, thereby pledging the credit of the United States. See *United States* v. *Forst*, 569 F. 2d 811 (4th Cir. 1978).[3]

2. Both New Mexico (Br. 10) and the amicus Multistate Tax Commission (Br. 12-14) rely upon *United States* v. *Boyd*, 378 U.S. 39 (1964), and claim that the Court there held that contractors under DOE standard management contracts were not agents of the government. As we explained in greater detail in our opening brief (at 23-25, 39-40), the aspect of *Boyd* upon which we rely is the sales tax portion of the case that was considered by the Tennessee Supreme Court, but not appealed to this Court (see 378 U.S. at 43 n.5). Moreover, the use tax involved in the appeal to this Court in *Boyd* was not a compensating use tax of the type involved here but rather a "privilege"-type use tax. The decision of this Court in *Boyd* therefore has no bearing on this case.

The applicable precedent, we submit, is *Kern-Limerick, Inc.* v. *Scurlock, supra*, which establishes the ground rules for tax immunity in connection with the performance of government contracts. Contrary to the assertion of the Multistate Tax Commission (Br. 7), that decision does not "place form over substance and extend implied intergovernmental tax immunity beyond its legitimate scope."

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[3]New Mexico points out (Br. 25) that the contractors' fixed management fees are likewise drawn down under the advanced funding procedure but are concededly subject to its gross receipts tax (see our opening brief at 6 n.3). In its view, this concession undermines the significance of the advance funding procedure with respect to the contractors' other disbursements. The management fee is a payment to the contractors and represents their profits; accordingly, such payments are properly regarded as "gross receipts" under N.M. Stat. Ann. 1953 § 72-16A-3.F (Supp. 1975). With respect to the other disbursements, however, the contractor is merely acting for the government as a paymaster of government funds to third parties. Such funds, therefore, are not taxable as part of the "gross receipts" of the contractor. Compare *United States* v. *County of Fresno*, 429 U.S. 452, 465-466 nn.14, 15. (1977).

Nor does it "stand[] as an anomaly in resolving momentous federal-state issues on the basis of chance contract clauses," as New Mexico contends (Br. 41). If Congress chooses to do so, it may waive the immunity of the United States from state and local taxes. Here, Congress has not chosen to do so. If, as we submit, Zia, Sandia, and LACI are purchasing agents of the government, their purchases are accordingly immune from the New Mexico gross receipts tax. And the relationship between the contractors and the government necessarily turns on the provisions and practical import of the contracts and their mode of implementation. It therefore cannot be seriously questioned that "the form of contracts, when governmental immunity is not waived by Congress, may determine the effect of state taxation on federal agencies, for decisions consistently prohibit taxes levied on the property or purchases of the Government itself" (*Kern-Limerick, Inc.* v. *Scurlock, supra*, 347 U.S. at 122-123; footnotes omitted).

CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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